Determination Number: AA 28/06
File Number: AEA 1271/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Dave Lindsay (Applicant)
AND	Carter Holt Harvey Limited t/a CHH Futurebuild (Respondent)
REPRESENTATIVES	Anne-Marie McInally, Counsel for Applicant Peter Kiely, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
MEMORANDA RECEIVED	5 October and 2 November 2005
DATE OF DETERMINATION	8 February 2006

DETERMINATION OF THE AUTHORITY ON COSTS

[1] In a determination of the substantive matter between the parties, dated 12 August 2005, I found Mr Lindsay's dismissal was justified. Costs were reserved.

[2] Counsel for Futurebuild filed a memorandum seeking a contribution to costs in the sum of $20,000 (GST exclusive), plus disbursements of $650.50, plus witnesses' expenses of $2,788.39. The actual legal fees incurred were $37,636 (GST exclusive).

[3] The figure of $20,000 was arrived at after considering a contribution of 66% of actual costs along the lines discussed in **Binnie v Pacific Health Limited** [2002] 1 ERNZ 438, and comparing it with an assessment based on a starting point of two days' preparation for every day of hearing (there were two). The former would generate a contribution of $24,000, while at a nominal hourly rate of $250 the latter would generate a contribution of $12,000.

[4] Counsel for Mr Lindsay submitted that a figure of $11,250 would be generated by taking a starting point of two days' preparation for every day of hearing, but that was only an assessment of the total reasonable cost and it was still necessary to consider whether that cost should be adjusted. Counsel submitted that a contribution of 66% of that figure would be $7,500, but that aspects of the investigation and its outcome meant a more appropriate contribution would be 20% or $2,250.

[5] Her overall position, taking into account further factors such as the importance of the case to Mr Lindsay, was that costs should lie where they fall.

[6] A recent decision of the full court in **PBO Limited v Da Cruz** (AC2A/05, 9 December 2005) means some of the above submissions are now academic. In particular the court in **Da Cruz** confirmed that a series of decisions including **Binnie** are not applicable in the Authority. Instead the court said that principles such as the following are appropriate and consistent with the Authority's functions and powers:

" [44] …
. there is a discretion as to whether costs should be awarded and what amount.
. the discretion is to be exercised in accordance with principle and not arbitrarily.
. the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
. equity and good conscience is to be considered on a case by case basis.
. costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
. it is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.
. that costs generally follow the event.
. that without prejudice offers can be taken into account.
. that awards will be modest.
. that frequently costs are judged against a notional daily rate.
. the nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances."

[7] Many employment relationship problems coming before the Authority do not, or should not, require the parties to incur more than relatively modest costs. The approach of the Authority has been to reinforce that by making modest awards when asked to determine costs in respect of them. That is reflected in the tendency of costs awards to cluster in a readily identifiable range, which has in turn been acknowledged in subsequent determinations, but the Authority has made awards outside the range when it considered it appropriate to do so.

[8] Further to that, the Court said in **da Cruz**:

"[46] We find there is nothing wrong in principle with the Authority's tariff-based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. For example, even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay or, on the other hand, the daily rate may not adequately reflect the conduct of the parties or the preparation required in a particularly complex matter. The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs."

[9] At [40] of the decision the court commented, too, on the need for the Authority to judge the reasonableness of the parties' costs in the light of the procedure used in the investigation in question. It commented further that the Authority's procedures range from the formal to the informal and from at least partly adversarial to inquisitorial, with the nature of the procedure in a particular problem being a relevant consideration.

[10] Here I take into account that there was a great deal of factual material to be traversed, and I accept that Futurebuild reasonably incurred significant costs in preparing for and attending the investigation meeting. The time so spent assisted the Authority and facilitated a shorter meeting than might otherwise have been the case. The amount of information to be covered, and the importance of assistance from the parties, weighs in favour of an increase in what might be considered the 'daily rate' applied to costs in the Authority.

[11] As the successful party, Futurebuild is entitled to a contribution to its costs. Bearing in mind in particular the extent of the preparation that was reasonably necessary I set that contribution at a total of $8,000 and order accordingly. In doing this I have also taken into account that while Mr Lindsay succeeded in some of his criticisms of Futurebuild's conduct, the success was limited when compared with his lack of success in a number of other areas and did not affect the final outcome.

[12] Clauses 6(1) and 15, Schedule 2 of the Employment Relations Act 2000 permit the Authority to award expenses, including the expenses of witnesses. Further to the expenses claimed here, Messrs Fenwick and Garrity were no longer employed by Futurebuild and both lived in Napier at the time of the investigation meeting. Both were key witnesses and the costs of travel to and

accommodation in Auckland were validly incurred. Airfares, including ticketing fees, came to $352 + $30.82 + $442 + $30.82 = $855.64. Airport transfer charges came to $150.84. Futurebuild is entitled to reimbursement of that amount, being $1,006.48.

[13] Other witnesses travelled from Whangarei to the meeting in Auckland. The cost of their hired car was $168.31. Futurebuild is entitled to reimbursement of that amount.

[14] Mr Fenwick's accommodation came to $636. I cannot identify the cost of Mr Garrity's accommodation from among the three other sets of accommodation charges provided, and nor can I identify whose accommodation was the subject of the charges. Since Mr Suvalko was the only other key witness, I am not prepared to order the reimbursement of all accommodation. Instead I will assess accommodation for Messrs Garrity and Suvalko at 2 x (2 nights x $150 per night) = $600. In total Futurebuild is entitled to reimbursement of witnesses' accommodation costs in the sum of $1,236.

[15] Disbursements came to $650.50, and Futurebuild is entitled to the reimbursement of that amount.

[16] The total payable by way of witnesses' expenses and disbursements is $3,061.29. I order payment accordingly.

Summary of orders

[17] Mr Lindsay is to pay Futurebuild:

(a) $8,000 as a contribution to its costs; and
(b) $3,061.29 as expenses and disbursements.

R A Monaghan
Member, Employment Relations Authority